No. 83-1662

In The
Supreme Court of the United States
October Term, 1983

DENNIS J. LEWIS,

Petitioner,

v.

BROWN & ROOT, INC.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

HORACE R. GEORGE
4720 Dowling Street
Houston, Texas 77004
713-526-5505

Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

No. 83-1662

In The
Supreme Court of the United States
October Term, 1983

DENNIS J. LEWIS,

Petitioner,

v.

BROWN & ROOT, INC.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were entered on August 15, 1983 Appendix G A-41 Case No. 83-799 and on January 9, 1984. Appendix J and

jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The district court did not find that petitioner's claims were so frivolous and were litigated in such an irresponsible, unreasonable and vexatious manner that petitioner and his counsel should be held jointly and severally liable for the employer's attorneys' fees in its findings of fact or conclusions of law. Appendix B, A-22, (Case No. 83-799). The final judgment makes no mention of attorneys' fees. Appendix C, A-25 (Case No. 83-799). The findings and judgment were entered on April 23, 1982. There was no evidentiary hearing by the district court prior to its award of attorneys' fees on June 14, 1982 and setting the amount of attorneys' fees on August 18, 1982. Petitioner's notice of appeal to the court of appeals was filed on May 18, 1982. The motion for an award of attorneys' fees was made more than ten days after April 23, 1982 and was granted on June 14, 1982. Appendix D, A-26 (Case No. 83-799). The district court had no jurisdiction to grant this motion. In its order granting attorneys' fee the district court made no finding that would justify imposition of attorneys' fees on petitioner and his counsel. For the first time, in its order setting the amount of attorneys' fees, on August 18, 1982, the district court made findings that petitioner's action was frivolous, unreasonable and without foundation. Appendix E, A-27 (Case No. 83-799). At the same time the district court made a finding that the attorney for petitioner unreason-

ably and vexatiously multiplied these proceedings. Appendix E, A-20 (Case No. 83-799). The action of the court on August 18, 1982 amounted to the district court reconsidering and altering its findings of fact and conclusions of law in violation of Rule 59(e) Federal Rules of Civil Procedure. *Gordon v. Heimann*, 715 F.2d 531.

Although petitioner does not concede he was guilty of any wrongdoing, which resulted in his discharge by the employer, he has not made a contested issue of discriminatory discharge. All of respondent's references to discriminatory discharge are not in point. The non-minority was rehired by the employer in February 1980 and petitioner was rehired in November 1980 about eight months later. They were both promised to be rehired in February 1980. The time difference in the rehiring was discriminatory. The disparate treatment in the rehiring is the primary source of petitioner's action.

According to the reporter's official certified transcript the following transpired during the course of this trial:

> "THE COURT: "Let's take our noon recess at this time and be back at one-thirty!" Exhibit F, A-39 (Case No. 83-799).

The court reporter in his affidavit said the time of the recess was at 12:20 P.M. Appendix 1a. It is undisputed the recess was after 12:00 P.M. and was for fifteen minutes. It was in fact a noon recess of fifteen minutes. Based upon the official transcript and the fact the respondent's allegation that petitioner's statement concerning a noon recess is an outright falsehood is incorrect. Respondent is also incorrect in his assertion that the clerk of the district court prior to 1:00 P.M. did not inform pe-

titioner and his counsel the district judge dismissed this case. What transpired at 1:30 P.M. is unknown to petitioner since the clerk told him the case was dismissed.

On page 11, footnote 6, of his brief respondent states: "Petitioners assertion that Judge Tate said the petitioner had been the victim of blatant discrimination by the employer (Petitioner at 10) is simply not true." The following statement is from Judge Tate's dissenting opinion 711 F.2d 1287, 1294:

> "The reasons that strongly militate against imposing liability for the defendant's attorneys fees upon the client Lewis himself, militate even more strongly against imposing them upon Lewis' attorney. The attorney had assured Lewis' access to the courts, to secure judicial redress for him for what on its face seemed blatant racial discrimination in rehiring the white assistant, but refusing to re-hire the black plaintiff, where both had been discharged for simultaneous and joint misconduct."

The respondent is incorrect in stating petitioner did not raise the ten-day limitation issue under Rule 59e of the Federal Rules of Civil Procedure before the court of appeals. The following is a statement presented to the court of appeals by petitioner.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States:

Christansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1098.

and is contrary to the following decisions of the United States Court of Appeals for the Fifth Circuit:

Ramsay v. Bailey, 531 F.2d 706, (5th Cir. 1976) cert. denied, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977).

United States v. Hitchmon, 58 F.2d 1357, (CA 5th).

and is contrary to the following rules of the Federal Rules of Civil Procedure:

Rule 52(b).

Rule 59(e).

and is contrary to the following rule of the Federal Rules of Appellate Procedure:

Rule 3.

and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Supreme Court needs to use its supervisory powers to clear up the many errors of the courts below.

The final judgment of the court of appeals was entered on January 9, 1984 and a petition for writ of certiorari was filed in the supreme court on April 5th, 1984.

The supreme court has jurisdiction to hear all of the issues presented in the petition, and review the entire course of proceedings in this action.

In *United States Postal Service Board of Governors v. Aikens,* 103 S.Ct. 1478, 75 L.Ed. 403 the court said the following regarding a prima facie case in a Title VII action:

> "By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable 'presumption that the employer unlawfully discriminated against' him. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981). See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). To rebut this presumption, 'the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.' Burdine, supra, at 255, 67 L.Ed.2d 207, 101 S.Ct. 1089. In other words, the defendant must 'produc[e] evidence that the plaintiff was rejected or someone else was preferred, for a legitimate, nondiscriminatory reason.'" Id., at 254, 67 L.Ed. 2d 207, 101 S.Ct. 1089.

The employer has introduced no evidence why Carney refused to rehire petitioner as promised. The employer did not do everything required in this case.

The district court in its conclusions of law state following ". . . 5. This action is dismissed on the merits because Plaintiff offered no evidence of racial animus." . . . Appendix B, A-24 (Case No. 83-799). The Supreme Court in *U.S. Post Office Board of Governors v. Aikens,* supra said:

> "The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent."

Furthermore, petitioner did not have an opportunity, at trial, to demonstrate that any reason proffered by the employer was not the true reason for the failure to rehire petitioner as argued but was a pretext because first the employer proffered no reason and secondly if it did petitioner was not given an opportunity to rebut the proffered reason.

One of the partners and associates of Vinson & Elkins said on a national morning television network news program earlier this year, that he owned over ten million dollars and is seeking to own over one hundred million dollars. Petitioner hopes he does not contribute, in any way, to the attorneys' fees of Vinson & Elkins especially where the district court without jurisdiction, without an evidentiary hearing, without complying with the rules of civil procedure, without statutory authority under Title VII, without a finding that the action was frivolous, unreasonable and without merit, without a finding that counsel multiplied vexatiously the proceedings, without allowing three hours for the trial of this action, without considering that the district court's findings and conclusions along with the stipulation of counsel that petitioner was qualified. Appendix F, A-32, clearly established a prima facie case, without considering it was not necessary for petitioner to prove discriminatory intent; and with the district court deciding this action before petitioner's case was completed and he rested, with a fifteen minute recess over the noon hour, with the district court obtaining this case through an exchange of cases with the employer being a long standing client of the district judge's former law firm, Vinson & Elkins substituting as attorneys less than two weeks before the trial, the changes in the

official transcript and for all of the aforesaid reasons point to the district court's decision not being supported by the law or the facts and the need for the supreme court to act.

The action of the court of appeals in granting petitioner some relief that could be obtainable only by appeal resulted in a further imposition of attorney's fees and double costs. With the facts showing petitioner clearly established a prima facie case, with one of the judges of the court of appeals dissenting from the majority's decision and with the relief obtained indicate petitioner's action for discrimination by the employer refusing to rehire him at the time agreed was intentional discrimination. Petitioner's action has merit. Petitioner's pursuit of his constitutional and statutory rights was justified.

Respectfully submitted,

HORACE R. GEORGE
4720 Dowling Street
Houston, Texas 77004
713-526-5505

Attorney of Record for Petitioner